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Nos. 86-48, 86-5114, 86-5120, 86-5277

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLEMENT A. MESSINO, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH W. HLAVACH, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS COVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTOINE A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted of conspiracy to violate 18 U.S.C. 1962(c) without agreeing that he would personally commit two predicate offenses (Nos. 86-48, 86-5114, 86-5120, 86-5277).

2. Whether a defendant's conviction for conspiracy to violate 18 U.S.C. 1962(c) may stand if he is acquitted of all the predicate acts charged in the indictment (No. 86-5114).

3. Whether the court's instructions adequately protected petitioners' right to a jury finding that they agreed to the commission of two or more acts of racketeering charged in the indictment (Nos. 86-48, 86-5120).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-48

CLEMENT A. MESSINO, PETITIONER

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UNITED STATES OF AMERICA

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 791 F.2d 489.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1986. The petitions for a writ of certiorari in Nos. 86-48 and 86-5114 were filed on July 15, 1986. The petition in No. 86-5120 was filed on July 21, 1986, and the petition in No. 86-5277 was filed on August 12, 1986. Both of those petitions are therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, all four petitioners (along with two other co-defendants) were convicted of conspiring to violate the federal racketeering statute, in violation of 18 U.S.C. 1962(d). Petitioner Covello was also convicted on seven counts of interstate transportation of stolen

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-48.

property, in violation of 18 U.S.C. 2314, and petitioner Turner was convicted on one of the stolen property counts. Covello was sentenced to eight years' imprisonment, Messino was sentenced to four years' imprisonment, and Hlavach and Turner were each sentenced to five year terms of probation. The court of appeals affirmed (Pet. App. 1-30).

The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals. The evidence showed that petitioners participated in a "chop shop" enterprise that stole cars, dismembered them, and sold the parts to salvage yards in Illinois and nearby states. Petitioner Messino furnished auto thieves for the enterprise. Petitioners Hlavach and Turner, together with co-defendant Meadows, stole cars for the enterprise and participated in the disassembly of the cars and the transportation of their parts. Petitioner Covello and co-defendant Mascio owned salvage yards through which the stolen cars and parts were moved. Pet. App. 4-5.

Over petitioners' objections, the district court instructed the jury on the RICO conspiracy offense as follows (Pet. App. 25):

> There is no requirement that each defendant must have agreed to commit two predicate acts of racketeering activity.
>
> The government need only prove that each defendant conspired to commit the offense of conducting the affairs of an enterprise through a pattern of racketeering activity and was aware that others had done likewise. * * *
>
> What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly born and that one or more of the means or methods described in the

> indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment, and that two or more persons, including the defendant, were knowingly members of the conspiracy as charged in the indictment.

At the same time, the court refused the following instruction requested by petitioners (Br. 17):

> To convict a defendant for a conspiracy to violate Section 1962(c) the government must prove beyond a reasonable doubt that a defendant, by his own words or actions, objectively manifested an agreement to participate in the affairs of the enterprise, through the commission of two or more of the violations of 18 U.S.C. § 2314.
>
> * * * * *
>
> In other words you must find that a defendant agreed to steal the cars described in two or more of Counts 2 through 8 of the indictment; that the particular cars were shipped in interstate commerce; and that the particular cars had a value of $5,000.00 or more.

Petitioners contended on appeal that the district court's instruction did not sufficiently state the elements of RICO conspiracy, which they argued requires an agreement not just to participate in the conduct of the enterprise's affairs but also to commit, personally, two separate predicate acts of racketeering. The court of appeals disagreed (Pet. App. 6-18). The court held that a conspiracy to violate Section 1962(c) requires that the defendant manifest (a) agreement to conduct or participate in the conduct of the enterprise's affairs and (b) agreement that the enterprise's affairs will be conducted through at least two criminal acts of racketeering. The court held, however, that the RICO conspiracy provision does

not require that the defendant agree that he will commit the two acts of racketeering himself (*id.* at 15).

The court of appeals based its conclusion partly on an examination of traditional principles of conspiracy law. The court found no reason to think that Congress had meant to abandon conspiracy-law principles when it created the crime of RICO conspiracy. Rather, the court concluded, the RICO conspiracy provision simply created a new objective for the conspiracy—namely, a violation of one of the substantive provisions of the RICO statute, 18 U.S.C. 1962 (a), (b), or (c) (Pet. App. 11-18). As in ordinary conspiracy prosecutions, the court held, proof of an agreement to promote the objective of the conspiracy —here, the conduct of an enterprise through at least two acts of racketeering—is sufficient for conviction (Pet. App. 13).

The court of appeals also looked to the broad remedial purpose of the statute and Congress's express intention that the statute be liberally construed (Pet. App. 7-8). The court concluded that the interpretation of Section 1962(d) urged by petitioners would frustrate the stated congressional policy of providing new remedies to combat organized crime (*id.* at 8). In particular, the court noted, petitioners' restrictive reading of the RICO conspiracy provision would undermine the effectiveness of the statute against the leaders of organized crime who typically insulate themselves from direct involvement in offenses committed at their direction (*id.* at 13-15).

ARGUMENT

1. Challenging the ruling below as incorrect, petitioners contend that this Court should resolve a conflict among the circuits over whether a defendant

charged with RICO conspiracy must agree to commit two acts of racketeering personally. Petitioner Messino also suggests (86-48 Pet. 4-6) that the decision below is contrary to this Court's ruling in *Sedima, S.P.R.L.* v. *Imrex*, No. 84-648 (July 1, 1985). Petitioner Hlavach warns (86-5114 Pet. 9-11) that the decision invites the expansion of civil and criminal RICO liability to reach individuals who lack criminal intent.

a. Under the RICO statute, a "pattern of racketeering activity" consists of two or more acts of racketeering activity. 18 U.S.C. 1961(5). A substantive RICO offense under 18 U.S.C. 1962(c) requires the government to prove that the defendant, who was employed by or associated with an "enterprise," conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. In turn, the RICO conspiracy offense under 18 U.S.C. 1962(d) requires the government to prove that the defendant conspired to violate one of the substantive RICO provisions.

The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator agree that he will himself perform the illegal act or acts that constitute the conspiracy's objectives. On the contrary, a conspirator may be convicted upon showing that he "agree[d] to participate in the conspiracy with knowledge of the essential objectives of the conspiracy." *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir. 1984), cert. denied, No. 83-1743 (Oct. 1, 1984). See *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (law requires only "showing sufficiently the essential nature of the plan and [the conspirators'] connections with it").

Under these basic principles of conspiracy law, the court of appeals properly held that the RICO conspiracy statute should be construed simply to require an agreement to participate in an enterprise, understanding and agreeing that the enterprise's affairs will be conducted through the commission of at least two criminal acts. There is no evidence that Congress, in enacting the conspiracy provision of the RICO statute, intended to depart from the general principles of conspiracy law. Indeed, far from imposing the additional restrictions on the prosecution that petitioners urge, Congress mandated that the RICO statute be liberally construed to achieve its objective of combatting organized crime. *Russello* v. *United States*, 464 U.S. 16 (1983); *United States* v. *Turkette*, 452 U.S. 576, 588-589 (1981). As the court of appeals recognized (Pet. App. 13), a requirement that each RICO conspirator agree to commit two predicate acts personally would "involve[] a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy" and would undermine the congressional objective of furnishing an effective weapon against organized crime figures, including those shrewd enough to insulate themselves from particular criminal acts committed by their colleagues or agents (*id.* at 14-15).

b. Petitioner Messino is incorrect in his contention that the decision below is contrary to this Court's statements in *Sedima, S.P.R.L.* v. *Imrex Co.*, *supra*. To begin with, *Sedima* construed Section 1962(c), a substantive RICO provision, whereas the court below interpreted Section 1962(d), the RICO conspiracy statute. Moreover, *Sedima* concerned civil actions un-

der RICO, not criminal prosecutions. The court of appeals here said nothing inconsistent with *Sedima*. Rather, the court accepted the principles set forth in *Sedima* and then proceeded to explain how those principles apply in the context of criminal RICO conspiracy.

Like *United States* v. *Turkette*, 452 U.S. at 586-587, *Sedima* recognized that RICO must be construed expansively and liberally to ensure that it " 'effectuate[s] its remedial purposes,' Pub. L. 91-452, § 904 (a), 84 Stat. 947." *Sedima*, slip op. 18 (citation omitted). And *Sedima* noted that RICO was designed "to supplement old remedies and develop new methods of fighting crime." *Ibid.* Those purposes are entirely consistent with the analysis of the court of appeals, which relied on the congressional objective to reach organized crime figures who operate at least one step removed from the actual commission of criminal acts.

Petitioner Messino suggests that the court of appeals ignored this Court's statement in *Sedima* that "[c]onducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses. * * * [T]he essence of the violation is the commission of [predicate acts sufficiently related to constitute a pattern] in connection with the conduct of an enterprise." *Sedima*, slip op. 17. Far from repudiating this analysis, the court of appeals echoed it. The court of appeals recognized that "a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to involvement

of an enterprise" (Pet. App. 15). In other words, the court acknowledged the need for proof of both participation in the enterprise and agreement to the commission of the racketeering acts.[2]

Petitioner Hlavach's argument (86-5114 Pet. 9-11) that the decision below eliminates the requirement of criminal intent for a RICO conspiracy prosecution is similarly incorrect. The court of appeals specifically held that a RICO conspirator must intend to participate in the affairs of a racketeering enterprise and intend that at least two acts of racketeering be committed by or in furtherance of the enterprise. Accordingly, petitioner's hypothetical insurance salesman who sells a legitimate policy to one of the auto salvage yards (86-5114 Pet. 11) is not guilty of RICO conspiracy simply by virtue of his business association. As the court of appeals explained (Pet. App. 15), "a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise * * *."

c. Petitioners' strongest argument for review is not that the decision below is wrong but that there is an inter-circuit conflict on the elements of RICO conspiracy. As the court below observed (Pet. App. 6-7), the courts of appeals have taken different positions on whether a RICO conspirator must agree to

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[2] Petitioner Messino is likewise wrong to assert (86-48 Pet. 5) that *Sedima*'s discussion of the meaning of a "pattern of racketeering activity" (slip op. 16 n.14) is inconsistent with the ruling below. Neither the district court nor the court of appeals suggested that the jury could convict without finding an agreement that the affairs of the enterprise be conducted through at least two predicate criminal acts.

commit at least two predicate acts himself. We believe, however, that the conflict is of less significance than petitioners allege. Moreover, there is reason to believe that the conflict may be resolved without the need for this Court's intervention. Consequently, we believe that review of the issue is unwarranted at this time.

Two circuits have stated that to be convicted of RICO conspiracy a defendant must agree to participate in the conduct of an enterprise through his own commission of two or more predicate acts of racketeering. *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1984), cert. denied, No. 83-2036 (Oct. 1, 1984); *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983). Five circuits, including the court below, have held otherwise. *United States* v. *Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985), cert. denied, No. 85-5046 (Nov. 4, 1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir. 1984), cert. denied, No. 83-6907 (Oct. 1, 1984); *United States* v. *Carter*, 721 F.2d at 1529 (11th Cir.). These cases, however, do not present as irreconcilable a conflict as petitioners suggest.[3]

[3] Contrary to petitioners' suggestion, the Fourth Circuit's decision in *United States* v. *Tillett*, 763 F.2d 628 (1985), does not take a position contrary to that of the court below. The *Tillett* opinion merely asserts that the defendant must agree to participate "directly or indirectly in the affairs of the enterprise through the commission of at least two predicate acts of racketeering activity." *Id.* at 633. The opinion does not state that the defendant must agree to commit the predicate acts himself. Indeed, it was the same ambiguous language in *United States* v. *Elliott*, 571 F.2d 880, 900-905 (5th Cir.), cert. denied, 439 U.S. 953 (1978), that the Eleventh Circuit in *United States* v. *Carter*, later held did *not* require the defendant's agreement to contemplate his personal commission of the predicate acts. *Carter*, 721 F.2d at 1529.

Although the First Circuit case, *United States* v. *Winter*, *supra*, contains language contrary to the ruling below, the issue presented here was not raised in the *Winter* case. The jury in *Winter* was instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that RICO conspiracy requires more—the actual personal commission of two predicate acts of racketeering. The First Circuit rejected that argument. The court's broader statement that a RICO conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts.

The Second Circuit in *United States* v. *Ruggiero*, *supra*, unlike the First Circuit in *Winter*, reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of Section 1962(d) arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with RICO conspiracy, based on two predicate acts. One of the two predicate acts was held to be legally insufficient on appeal: the court concluded that that alleged predicate act did not qualify as an act of racketeering at all. For that reason, Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one valid

act of racketeering, and it was thus not a violation of Section 1962(d).

In any event, the *Ruggiero* case, like the *Winter* case, was decided before the issue in this case had been presented to and considered by other courts. The *Ruggiero* court stated that it based its conclusion that a defendant must at least agree to commit two or more predicate crimes himself on the absence of controlling contrary authority. 726 F.2d at 921. At the time *Ruggiero* was decided, there was no contrary authority at all,[4] and the court considered its construction of Section 1962(d) to be required by "[p]revailing case law" (*ibid.*). Since that time, all five circuits to consider the issue have ruled contrary to the Second Circuit. Because of this new case law, the Second Circuit might well reconsider its decision on this issue when presented another opportunity.

In sum, although there are conflicting pronouncements on the issue in the courts of appeals, we believe that the conflict may well disappear without a resolution by this Court.[5] This Court denied certiorari on

[4] The Second Circuit decided *Ruggiero* just five days after *Carter* was decided and obviously was not aware of the Eleventh Circuit's ruling.

[5] Petitioner Hlavach cites (86-5114 Pet. 9) additional cases that he alleges are contrary to the decision below. The two Fifth Circuit decisions that he cites— *United States* v. *Phillips*, 664 F.2d 971, 1038-1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), and *United States* v. *Martino*, 648 F.2d 367, 395-396, 400 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982)—are consistent with the broader interpretation of RICO conspiracy, as the Eleventh Circuit's subsequent decision in *Carter* shows. See 721 F.2d at 1530-1531. Moreover, *United States* v. *Boffa*, 688 F.2d 919, 933-934 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983), was addressed in the Third Circuit's subsequent decision in *United States* v. *Adams*, *supra*, which repudiated the dictum in *Boffa* by holding that a defendant need not agree personally to commit predicate acts in order to sustain a RICO conspiracy conviction. See 759 F.2d at 1116. Finally, petitioner's reference to *United States* v. *Brown*, 583 F.2d 659, 669-700 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), is inapposite in light of the later *Adams* decision, which now represents that circuit's position on the question.

the same issue in two recent cases. *United States* v. *Adams*, *supra*; *United States* v. *Carter*, *supra*. No different result is warranted here.

2. Petitioner Hlavach argues (86-5114 Pet. 8) that his acquittal on the seven substantive counts, which were also charged as predicate acts under the conspiracy count, demonstrates the inadequacy of the proof on the RICO count. But, as the court of appeals correctly ruled (Pet. App. 28), "the jury's conclusions with regard to the substantive crime[s] are irrelevant to the evaluation of the adequacy of the proof underlying the RICO conviction[]." See *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984) (defendant convicted on one count may not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count); *United States* v. *Brooklier*, 685 F.2d 1208, 1220 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) (no reversal because of inconsistency between conviction on RICO conspiracy and acquittal on predicate acts).

3. Petitioners Messino (86-48 Pet. 7-8) and Covello (86-5120 Pet. 2) argue that the court gave instructions that permitted the jury to convict on a finding that they agreed to commit two or more predicate acts of racketeering, even if the predicate acts were not those charged in the indictment. The challenged jury instruction made specific reference to the substantive counts charging seven acts of interstate

transportation of stolen property, acts that were also charged as predicate acts of racketeering under the RICO conspiracy count. The transcript reflects that the court charged as follows (Tr. 1040 (emphasis added)):

> In order to find that these various individuals and companies constituted an enterprise, you must find beyond a reasonable doubt that these individuals and companies comprised an ongoing organization; that the various associates functioned as a continuing unit, and that the associates comprised an entity separate and apart from the pattern of activity in which it engages.
>
> The term racketeering activity for the purposes of this case includes any act in violation of Title 18, United States Code, Section 2314, *such as* charged in Counts 2 through 8 of the indictment.

The court of appeals concluded that this instruction was in fact erroneous (Pet. App. 26). Because petitioners did not object to the instruction, however, the court assessed the error under a plain error standard and found no reversible error (*ibid.*). This ruling is correct, fact-specific, and does not merit review.

To begin with, the transcript version of the instruction is different from the instruction proffered by the government and accepted by the district court (Gov't Instruction No. 27). It is also different from the copy of the instructions that was given to the jury for use during its deliberations. Those documents reflect an instruction, concededly correct, that does not include the word "such."

Accordingly, the transcription may in fact be inaccurate. Moreover, as the court of appeals noted (Pet. App. 26), the error was certainly inadvertent.

In any event, the error was insignificant.[6] The jury had correct instructions as well as the indictment itself when deliberating (Tr. 1060). And elsewhere in the jury instructions, the court specifically told the jury that the predicate acts were those alleged in the substantive counts: "[w]hat the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly born and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment" (Tr. 1043). These factors, taken together, support the court of appeals' holding that the instructions protected petitioners' right to have the jury convict only on finding (1) that they conspired to participate in the affairs of an enterprise and (2) that they agreed that the enterprise's affairs would be conducted through at least two specifically charged acts of racketeering.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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[6] Petitioners' failure to object is evidence either that the correct instruction was in fact given or that the error was of so little significance that petitioners' counsel did not notice it or think it worth objecting to—and hence that the jury could not have been affected by it.

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